TA FIRST CREDIT SDN BHD

v.

NEWACRES SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
TEE AH SING J
[ORIGINATING SUMMONS NO: S5-24-1628-2005]
2 JANUARY 2008

LAND LAW: *Charge - Order for sale - Application for - Breach of terms of charge - Whether there were various irreconcilable inconsistencies in documents prepared by plaintiff - Whether plaintiff bound by various provisions of Moneylenders Act 1951 - Whether defendant showed 'cause to the contrary' within meaning of s. 256(3) of the National Land Code - Moneylenders Act 1951, ss. 17, 19, 23*

MONEYLENDERS: *Charge - Security for loan - Order for sale - Non compliance with provisions of Moneylenders Act 1951 - Whether plaintiff bound by various provisions of Moneylenders Act 1951 - Whether defendant showed 'cause to the contrary' within meaning of s. 256(3) of the National Land Code - Moneylenders Act 1951, ss. 17, 19, 23*

The defendant was the registered proprietor of certain lands ('the said lands'). By an offer letter dated 27 October 1997 ('letter of offer') and a loan agreement dated 4 November 1997 ('the said loan agreement') executed between the plaintiff and the defendant, upon request by the defendant, the plaintiff approved a loan for the amount of RM5,000,000 ('the said loan') to the defendant for the purpose to use the said loan as an advance to TA Securities Berhad. In consideration of the said loan, the defendant had *vide* a charge dated 25 November 1997 ('the said charge') charged the said lands to the plaintiff as security for the said loan. The defendant had breached the terms of the said charge when the defendant failed/neglected to make the repayment upon the demand made by the plaintiff. The plaintiff *vide* letter of demand dated 1 June 2005 demanded from the defendant the sum of RM15,466,838.92 together with interest until full settlement. As the defendant failed to respond to the said letter of demand within the stipulated period the plaintiff had thereafter through its solicitor served a Form 16D under the National Land Code ('the NLC') to the defendant at its registered address. By way of an originating summons (encl. 1), the plaintiff sought for an order of

A sale of the said lands under s. 157 of the NLC. It was the defendant's case that a perusal of the said letter of offer, said loan agreement, the memorandum of an agreement for a loan ('the memorandum') and the annexure to charge prepared by the plaintiff showed there were various irreconcilable inconsistencies B such as (a) the plaintiff's imposition of compound interest or interest upon interest was illegal and ran foul of the Moneylenders Act 1951; (b) inconsistency on the plaintiff's computation of default of interest; (c) that the plaintiff's imposition of roll over fee, redemption fee and acceptance fee appeared to be ambiguous.

C

Held (dismissing encl. 1 with costs):

(1) The plaintiff, as a licensed moneylender, was bound by the various provisions of the Moneylenders Act 1951. The D plaintiff's imposition of compound interest or interest upon interest was illegal pursuant to s.17(1) of the Moneylenders Act 1951. The plaintiff had also been charging simple interest on the roll over fee which was neither principal nor interest which was contrary to ss. 17 and 23 of the Moneylenders Act E 1951. The plaintiff's imposition of interest at the rate of 22% per annum as claimed in Form 16D was illegal and contravened s. 17A(1) of the Moneylenders Act 1951 as the plaintiff could not charge interest exceeding 12% per annum on a secured loan. The plaintiff's imposition of roll over fee, F redemption fee and acceptance fee was also illegal and contravened s. 23 of the Moneylenders Act 1951. The statement of account also did not comply with s. 19(1) of the Moneylenders Act 1951 and the First Schedule to the Act. Hence, the defendant had shown 'cause to the contrary' within the meaning of s. 256(3) of the NLC and would fall G under the third category as set out by the Federal Court in *Low Lee Lian v. Ban Hin Lee Bank Bhd.*

Case(s) referred to:
Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 FC ***(refd)***

H

Legislation referred to:
Moneylenders Act 1951, ss. 2(e), 5, 16, 17A(1), 19(1), 23

For the plaintiff - CY Lim; M/s Chris Koh & Chew
For the defendant - Mohd Alakhir; M/s Dennis Nik & Wong

I

Reported by Suhainah Wahiduddin

JUDGMENT

Tee Ah Sing J:

[1] The defendant is the registered proprietor of lands held under titles H.S. (D) 38192 to H. S. (D) 38220 and No. PT. 5704 to PT. 5732, all in the Mukim of Klang, Daerah Klang, Negeri Selangor ("the 1st lands") and the registred proprietor of lands held under titles H. S. (D) 38222 to H.S. (D) 38241 and No. PT. 5734 to PT. 5753 all in the Mukim of Klang Daerah Klang, Negeri Selangor ("the 2nd lands"). The 1st lands and the 2nd lands hereinafter collectively referred to as "said lands".

[2] By an offer letter dated 27 October 1997 ("the said letter of offer") and a loan agreement dated 4 November 1997 ("the said loan agreement") executed between the plaintiff and the defendant, upon request by the defendant, the plaintiff approved a loan for the amount of RM5,000,000 ("the said loan") to the defendant for the purpose to use the said loan as an advance to TA Securities Berhad upon the instruction by the defendant and/ or for other lawful purposes which is agreed by the plaintiff at its absolute discretion.

[3] In consideration of the said loan the defendant had *vide* a charge dated 25 November 1997 ("the said charge") charged the said lands to the plaintiff as security for the said loan *vide* charge presentation No. 60604/1997, Jilid 119, Folio 55.

[4] The defendant had breached the terms of the said charge when the defendant refuses, fails and/or neglects to make the repayment upon the demand made by the plaintiff.

[5] The plaintiff had *vide* its solicitor's letter of demand dated 1 June 2005 demanded from the defendant the sum of RM15,466,838.92 as at 31 January 2005 together with interest until full settlement. As the defendant failed to respond to the said letter of demand within the stipulated period the plaintiff had thereafter through its solicitor served a Form 16D under the National Land Code 1965 ("the NLC") dated 20 June 2005 to the defendant at its registered address, its business address and its last known addresses by the plaintiff on 21 June 2005.

[6] By way of an originating summons (encl. 1) the plaintiff sought for an order of sale of the said lands under s. 157 of the NLC.

[7] The case for the defendant is as follows:

1. A perusal of the said letter of offer, the said loan agreement, the Memorandum of an Agreement for a Loan ("the memorandum") and the annexure to charge prepared by the plaintiff showed that there are various irreconcilable inconsistencies. The first is as regards the issue of compound interest where it is clear from encl. 2 that the plaintiff has been charging the said interest. Whilst the right to charge compound interest is provided under the said letter of offer (exh. "TA2" pp. 217-223) and the annexure to the said charge (exh. "TA2") it is never provided so in the said loan agreement and the Memorandum under s. 16 of the Moneylenders Act 1951 (exh. "TA2" pp. 182-187).

2. The second is as regards the issue of the redemption fee where whilst the said right to charge the said fee is provided under the said loan agreement and the annexure to the said charge, it was never provided so in the letter of offer and the memorandum.

3. The plaintiff's right to charge an acceptance fee also appears to be ambiguous in that whilst the said right to charge the said fee is provided for under the said letter of offer and the memorandum, it was never provided so in the said loan agreement and the annexure to the said charge.

4. There is also an inconsistency on the plaintiff's computation of default interest in that whilst the letter of offer stipulates that the plaintiff had the right to charge 4% per annum above the prescribed rate, the said loan agreement says that the plaintiff has the right to charge 4% per annum above the prescribed rate and the stated rate.

5. The plaintiff's imposition of compound interest or interest upon interest is illegal and runs foul of the Money Lenders Act 1951.

6. Even if the plaintiff has the right to claim compound interest as set out in the said letter of offer, the memorandum is silent on this and the defendant contended that the memorandum shall prevail over the other agreements.

7. In the alternative, if the plaintiff's right to impose compound interest is lawful, under the law, the plaintiff can only charge simple interest on either the principal or interest that is in default. However, it is clear from encl. 2, the plaintiff has been charging simple interest on the roll over fee which is neither principal nor interest which is contrary to the Moneylenders Act 1951.

8. The plaintiff's imposition of interest at the rate of 22% per annum is not only a breach of the agreements but is also illegal and contravenes the Moneylenders Act 1951 as the plaintiff cannot charge interest exceeding 12% per annum on a secured loan.

9. Further the provision of the "Prescribed Rate" in the agreements is also illegal as it allows the plaintiff to impose interest higher than the statutory limit of 12% per annum on a secured loan.

10. The plaintiff's imposition of roll over fee, redemption fee and acceptance fee is also illegal and contravenes the Moneylenders Act 1951.

11. Whilst the plaintiff has the rights to charge default interest in the letter of offer, the period of calculation of same will commence after a demand is made. In the present case, the plaintiff had been charging the said default interest even before there was any demand and thus the plaintiff's claim for the same is premature and misconceived.

12. Further and/or in the alternative, the interest imposed by the plaintiff is excessive in the nature of penalty and/or contrary to public policy.

13. Form 16D has demanded for a wrongful sum of RM15,973,017.82 as at 31 May 2005 together with interest at 22% per annum which is unlawful.

14. In a related civil proceeding under Kuala Lumpur High Court Suit No. D8-22-830-2002 ("the said civil suit") the High Court dismissed the plaintiff's application for summary judgment against the defendant herein on the issue of unlawful claim for interest and only allowed the plaintiff's claim for the principal amount of RM5,000,000 (which is pending appeal) (See encl. 6).

[8] The plaintiff in reply (encl. 7) contended as follows:

1. The defendant's contention that there are inconsistencies in the terms of the letter of offer, the said loan agreement, the memorandum and the annexure to the said charge is baseless and also will not constitute a cause to the contrary.

2. It is clearly provided in the agreements respectively that the terms under the agreements shall be in addition to and not in derogation of any specific agreement and/or the letter of offer from time to time subsisting between the plaintiff and the defendant with regard to the said loan.

3. The agreements which had been signed by the defendant shall be read together and as a whole between each of the agreements respectively and shall not read separately. This is clearly stated in the agreements especially cl. 12.16 in the said loan agreement, cl. 59(1) of the annexure to the said charge and cl. 6 in the memorandum.

4. The plaintiff has the right to impose interest upon the roll over fee as the provision to impose the interest upon the roll over fee is clearly set out in the said loan agreements.

5. The compound interest or interest upon interest is valid as provided under the agreements.

6. The defendant had made several payments for interest towards the claims of interest by the plaintiff without raising any objection or dispute.

7. The plaintiff is exempted from all the provisions under the Moneylenders Act 1951 based on the exemption given to the plaintiff under s. 2(e) of the Moneylenders Act 1951.

8. The plaintiff has the right to charge default interest in accordance with the agreements.

9. The Kuala Lumpur High Court had dismissed the plaintiff's application for summary judgment against the defendant in a civil proceeding on the issue of the interest because in that civil proceeding the High Court has never denied on the issue in relation to the interest claimed by the plaintiff. The court merely allowed the plaintiff's claims for the total principal amount of RM5,000,000 against the defendant and the court

adjourned the issue on the interest claimed by the plaintiff to be ascertained in full trial. The contention of the defendant that the High Court had dismissed the plaintiff's claims for interest is totally baseless and is a way to confuse the court.

[9] The learned counsel for the plaintiff has put in a written submission dated 8 January 2007. The learned counsel for the defendant has put in a written reply dated 14 February 2007. The learned counsel for the plaintiff has put in a written reply dated 4 April 2007.

[10] The relevant parts of the said loan agreement (p. 152) reads as follows:

> AN AGREEMENT FOR A LOAN made ... Between TA First Credit Sdn. Bhd. (Company No. 29009 – A) (formerly known as Credit Leasing Corporation Sdn. Bhd.)
>
> ...
>
> WHEREAS:
>
> (1) The Lender is a company licensed under the Moneylenders Act 1951 to carry on and carries on the business *inter alia* as a moneylender within the meaning assigned to such expression by the aforesaid Act ...

[11] The said loan agreement clearly shows that the plaintiff is a licensed money lender and that being the case, the plaintiff is bound by the various provisions of the Moneylenders Act 1951.

[12] Exhibit "CHY1" to encl. 7 is the license under s. 5 of the Moneylenders Act 1951 to the plaintiff valid from 1 July 1997 to 30 June 1998.

[13] The plaintiff's imposition of compound interest or interest upon interest is illegal pursuant to s. 17(1) of the Moneylenders Act 1951.

[14] It is clear from the statement of account (exh. "CHY6" to encl. 7) that the plaintiff has been charging simple interest on the roll over fee which is neither principal nor interest which is contrary to ss. 17 and 23 of the Moneylenders Act 1951.

[15] The plaintiff's imposition of interest at the rate of 22% per annum as claimed in Form 16D is illegal and contravenes s. 17A(1) of the Moneylenders Act 1951 as the plaintiff cannot charge interest exceeding 12% per annum on a secured loan.

[16] The plaintiff's imposition of roll over fee, redemption fee and acceptance fee is also illegal and contravenes s. 23 of the Moneylenders Act 1951.

[17] Exhibit "CHY6" to encl. 7 is the statement of account as at 10 May 2001. The statement of account does not comply with s. 19(1) of the Moneylenders Act 1951 and the First Schedule to the Act, namely Table 1, Table 2, Table 3 and Table 4.

[18] In view of the aforesaid I find that the defendant has shown "cause to the contrary" within the meaning of s. 256(3) of the NLC and this would fall under the third category as set out by the Federal Court in *Low Lee Lian v. Ban Hin Lee Bank Bhd.* [1997] 2 CLJ 36.

[19] As such I dismiss enclosure 1 with costs.